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IN THE

# Supreme Court of the United States

CASSENS TRANSPORT CO., ET AL.,
*Petitioners,*

v.

PAUL BROWN, ET AL.,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR MICHIGAN DEFENSE TRIAL COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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## QUESTION PRESENTED

The McCarran-Ferguson Act reverse preempts federal statutes that "impair . . . any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). A federal statute, such as RICO, "impair[s]" a state law if it "interfere[s] with a State's administrative regime." *Humana Inc. v. Forsyth*, 525 U.S. 299, 310 (1999).

Michigan's Workers' Disability Compensation Act ("WDCA"), MICH. COMP. LAWS § 418.101 *et seq.*, like workers' compensation laws in every other state, creates an administrative regime that transfers the financial risk of workplace injuries from the employee to the employer. This Court has both expressly recognized this risk-transferring effect by describing workers' compensation as "a compulsory insurance system" and acknowledged that employers who self-insure in the workers' compensation context are "insurers." Additionally, this Court has stated that "the rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws."

1. Do workers' compensation laws, which create "a compulsory insurance system," regulate the business of insurance?

2. Does providing treble damages for RICO claims interfere with a state workers' compensation system specifically designed to be the exclusive remedy for workers' compensation claims?

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## BRIEF FOR THE MICHIGAN DEFENSE TRIAL COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONERS

*Amicus curiae* Michigan Defense Trial Counsel respectfully submits that the petition for a writ of certiorari should be granted.[1]

## INTEREST OF *AMICUS CURIAE*

The Michigan Defense Trial Counsel ("MDTC") is a business association organized and existing to advance the knowledge and improve the skills of defense lawyers, to support improvements in the adversary system of jurisprudence, and to address the interests of the legal community in Michigan. MDTC appears before this Court and Michigan courts as a representative of defense lawyers and their clients in Michigan, many of whom are affected by the issues in this case.

## STATEMENT

This case presents a question of exceptional importance that involves the interpretation of two important federal statutes, the McCarran-Ferguson Act and the RICO Act, and affects millions of workers and hundreds of thousands of employers in the Sixth

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the MDTC, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. All parties were timely notified, in accordance with Rule 37.2, of MDTC's intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

Circuit. After the Sixth Circuit's decision, state workers' compensation laws no longer provide the exclusive remedy for workplace injuries. Instead, RICO claims can now be combined with workers' compensation claims, tripling the amount of liability exposure for employers. This expansion of the remedies available for disputes arising from workplace injuries undermines the very reason that States, including Michigan, adopted the compulsory insurance regime known as workers' compensation: to create an exclusive, administrative remedy for workplace injuries that both eliminates litigation and guarantees that employees will recover predetermined amounts.

1. Before 1910, state common-law rules governed employee attempts to recover from employers for workplace injuries. "Under these laws an injured worker's only recourse was through the courts and his chances of recovery were slight." NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 11 (1973) (hereinafter "COMPENDIUM"). According to some estimates, "not more than 15 percent of injured employees ever recovered under the common law, even though 70 percent of [workplace] injuries were estimated to have been related to working conditions or employer's negligence." *Id.* This low rate of recovery for employees stemmed from a number of factors: the standard of care for employers was low, "extend[ing] only to proper diligence"; "fellow workers . . . were reluctant to testify against the employer"; the employer benefited from a number of defenses, including contributory negligence, the fellow-servant rule, and assumption of risk; and "the expense of litigation" was an obstacle to employees. *Id.* at 12. On the other side of the equation, employers faced the risk of "pay[ing] out large sums of money for defense

of these claims and for satisfaction of verdicts." *Id.* at 14.

Between 1911 (when Wisconsin passed its workers' compensation act) and 1948 (when Mississippi did), each of the states and the territories of Alaska and Hawaii enacted workers' compensation regimes to address these problems arising from the common-law approach. COMPENDIUM at 18; *see also Anderson v. Hawaiian Dredging Co.*, 24 Haw. 97 (1917) (noting that the territory enacted workers' compensation in 1915); *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531, 533 (Alaska 1972) (same). These regimes specifically sought to "reduce court delays, costs and workloads arising out of personal injury litigation" and to "[e]liminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals." U.S. CHAMBER OF COMMERCE, 2008 ANALYSIS OF WORKERS' COMPENSATION LAWS 6 (2008) (hereinafter "CHAMBER OF COMMERCE ANALYSIS"). In addition to alleviating these litigation costs, state workers' compensation regimes were designed to make workers' compensation "the *exclusive remedy* of employees against employers, with the effect that injured employees ordinarily lost the right to seek a higher tort liability award than their compensation benefits." COMPENDIUM at 23 (emphasis added). Indeed, "'[workers' compensation] relieves the employer not only of common-law tort liability, but also of statutory liability under virtually all state statutes, as well as of liability in contract and in admiralty, for an injury covered by the compensation act.'" *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 663 (2006) (quoting 6 A. LARSON & L. LARSON, WORKER'S COMPENSATION LAW § 100.03[1], at 100–11).

The enactment of workers' compensation shifted the risk of lost wages and medical expenses from the employee to the employer. It acts as compulsory insurance and has precisely the same effect as if the employee, in the absence of workers' compensation, purchased an individual insurance policy with the employer as its insurer. In a free-market system, "workers might be persuaded to accept a wage increment equal to the premium for an individual insurance policy" that would cover on-the-job injuries. COMPENDIUM at 23. "In practice, however, many workers will prefer current consumption over protection and will demand the risk premium in cash." *Id.* "Workmen's compensation makes protection compulsory and substitutes the power of the State for the market system." *Id.*; *see also Richardson v. Belcher*, 404 U.S. 78, 83–84 (1971) ("The original purpose of state workmen's compensation laws was to satisfy a need inadequately met by private insurance or tort claim awards."). Workers' compensation protects against the loss of wages and is complemented by other insurance benefits, including temporary disability insurance, accidental death and dismemberment insurance, and group life insurance. COMPENDIUM at 41. As in other states, Michigan's WDCA provides that the Act is the "exclusive" means by which an employee may recover benefits from an employer for personal injury. MICH. COMP. LAWS §§ 418.131, 418.841(a) .

2. The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). To determine whether a practice, such as the provision of workers' compensation benefits, constitutes the "business of insurance,"

this Court looks to three factors: "'*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'" *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 339 (2003) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)). A federal statute would "impair" a state law if it "interfere[s] with a State's administrative regime." *Humana Inc. v. Forsyth*, 525 U.S. 299, 310 (1999).

3. This case arises from workers' compensation claims filed by six current or former employees of Cassens Transport Company. Pet. App. 3a. The plaintiffs allege that Cassens, as well as Crawford & Company (Cassens' claims adjuster) and certain doctors, engaged in a pattern of racketeering activity designed to deny the plaintiffs' workers' compensation claims. *Id.* According to the plaintiffs, Cassens and Crawford improperly denied workers' compensation benefits both by deliberately selecting and paying unqualified doctors to give fraudulent medical opinions that would support the denial of workers' compensation benefits, and by ignoring legitimate medical evidence of their injuries. *Id.* Despite the Michigan WDCA's exclusive remedy, the plaintiffs challenged the denial of their workers' compensation claims as violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1691(1)(B), 1962(c), & 1964(c). Relying on the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), Cassens and Crawford moved for dismissal on the ground that the Michigan WDCA reverse-preempted the RICO claims.

The district court agreed, reasoning that Michigan enacted the WDCA for the purpose of regulating the business of insurance. Pet. App. 58a. First, the WDCA governs a practice that "transfers or spreads a risk"—namely the risk of incurring costs associated with work-related injuries—"that is characteristic of insurance." *Id.* at 59a. Second, "if one were to define the employee as the insured and the self-insured employer as the insurer," then providing workers' compensation benefits under the WDCA would be "an integral part of the policy relationship." *Id.* And third, workers' compensation is limited to entities in the insurance industry, as adjusters of insurance claims (like Crawford, which administers Cassens' workers' compensation benefits), beneficiaries (*i.e.*, employees), and self-insuring employers that "stand[] in the stead of an insurance company" (like Cassens) are all entities within the insurance industry. *Id.* at 59a–60a. The district court further recognized the common sense point that allowing RICO claims "affording treble damages and a private right of action" would "impair" Michigan's workers' compensation regime by "turn[ing] on its head the policy balance that the Michigan legislature struck" when it enacted its workers' compensation regime. *Id.* at 63a.

The Sixth Circuit reversed. The court concluded that workers' compensation benefits, despite their "insurance-like impression," "are not insurance" because "[t]here is no contract in the workers' compensation scheme." Pet. App. 19a. Workers' compensation "merely creates a legislative remedy . . ., not an insurance contract." *Id.* at 20a. The Sixth Circuit asserted that without a contract, a "policyholder's risk" is not spread or transferred and there is no policy relationship to consider. *Id.* Furthermore, because the WDCA applies to almost all Michigan em-

ployers and employees and because "self-insurance does not relate to the 'business of insurance,'" the court concluded the WDCA is not limited to entities in the insurance industry. *Id.* at 21a, 24a. While recognizing that the WDCA "mak[es] workers' compensation the exclusive remedy except in cases of intentional torts," *id.* at 22a, the court also concluded that RICO remedies for treble damages would not impair the workers' compensation regime. The Sixth Circuit reached this conclusion relying on *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), where "the availability of punitive damages under state law *greater than* the treble damages available under RICO supported the conclusion that RICO did not impair the state law." Pet. App. 26a (emphasis added). The court also asserted that "because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance." *Id.*

## REASONS FOR GRANTING THE PETITION

The decision of the Sixth Circuit rewrites the bargain of workers' compensation that has been operating in Michigan and other states for approximately a century. The decision changes the states' insurance regimes for dealing with workplace injuries from one of limited remedies that must be sought exclusively through the workers' compensation system to one in which employees can first recover guaranteed compensation benefits and then seek treble damages and attorney fees in court. In the course of imposing this change, the Sixth Circuit reached conclusions that directly conflict with a number of this Court's decisions as to what insurance is. Although this Court has repeatedly recognized that workers' compensation is a form of insurance—including describing workers' compensation as

"a compulsory insurance system," *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 44 (1999)—and has, since 1917, acknowledged the risk-transferring effect of workers' compensation, the Sixth Circuit somehow concluded that "workers' compensation benefits are not insurance." Pet. App. 19a. The court of appeals also concluded that self-insurance is not insurance, despite the fact that this Court has twice expressly recognized—including once in the context of workers' compensation—that self-insurers are indeed insurers. Having concluded that workers' compensation and self-insurance are not insurance and so do not fall within insurance for the purposes of McCarran-Ferguson, the Sixth Circuit also concluded that transforming what would qualify as a "hermetically sealed" regime, *see Humana*, 525 U.S. at 312, into one subject to RICO remedies would not "impair" that regime or "interfere with" it.

The consequences of the Sixth Circuit's decision are startling and severe. The 13.6 million employees in the four states of the Sixth Circuit can now sue their employers under RICO, claiming treble damages and attorney fees if they are denied workers' compensation benefits, even though they cannot sue their employer in court to obtain the workers' compensation benefits. This dramatic expansion of employer liability divests employers in the Sixth Circuit of their side of the workers' compensation bargain by depriving them of the orderly resolution of workers' compensation issues through an administrative law process and of the avoidance of costly litigation. The increase in premiums that will result from the Sixth Circuit's decision will redound to the detriment of employees in diminished wages and layoffs. Even if the opinion below were construed to apply only to self-insurers, it would interfere with state regimes by

driving self-insurance out of the market, as employers would choose to pay additional insurance costs rather than to face exposure to RICO's remedies.

## I. THE SIXTH CIRCUIT'S DECISION CONTRAVENES MULTIPLE DECISIONS OF THIS COURT, INCLUDING *AMERICAN MANUFACTURERS* AND *HUMANA*

The Sixth Circuit's formalistic approach to determining whether a practice is insurance and its analysis of whether a federal statute would interfere with a State's administrative regime ignores the fundamental aspects of workers' compensation. The result it reached conflicts directly with this Court's decisions, including *American Manufacturers* and *Humana*.

### A. The Decision Below Conflicts With This Court's Decisions Recognizing Workers' Compensation And Self-Insurance As Forms Of Insurance

The Sixth Circuit's opinion rests on the premises that neither workers' compensation in general nor self-insurance in particular qualify as insurance under the McCarran-Ferguson Act. Pet. App. 19a, 24a, & 26a. Relying on a formalistic view of the term "insurance," the court of appeals concluded that the only type of risk-spreading relationship that qualifies as insurance for the purposes of McCarran-Ferguson is that documented in a formal, written contract of insurance. This conclusion conflicts with at least five of this Court's decisions.

In *American Manufacturers*, this Court described workers' compensation as "a compulsory insurance system": "In the early 20th century, States began to replace the common-law system . . . with a *compul-*

*sory insurance system* requiring employers to compensate employees for work-related injuries without regard to fault." *Id.* at 44 (emphasis added). Under this system, all employers must either obtain workers' compensation insurance from a private insurer or *act as the insurer themselves* by seeking permission from the relevant State to self-insure. *Id.* In fact, in *American Manufacturers*, this Court specifically explained that "[s]elf-insured employers and private insurers face identical obligations under Pennsylvania's workers' compensation system, and we therefore refer to them collectively as 'insurers' or 'private insurers.'" *Id.* at 44 n.1. In other words, this Court recognized that the self-insured employer is an insurer even though there is no formal contract of insurance.

More recently, in *Howard Delivery Service, Inc. v. Zurich American Insurance Co.*, 547 U.S. 651 (2006), this Court, while describing "the essential character of workers' compensation regimes," *id.* at 662, used the term "insurance" in a way interchangeable with the regimes themselves: "Workers' compensation *insurance* . . . directly benefits insured employers by eliminating their tort liability for workplace accidents." *Id.* at 663 n.6 (emphasis added). It is not insurance policies taken out by employers with insurance companies, of course, that eliminated tort liability; rather it was the passage of workers' compensation laws that eliminated employers' tort liability by turning employers into the insurers of their employees. *See id.* at 662 ("Workers' compensation prescriptions . . . modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents."). Rather than focusing on the lack of a negotiated contract, this Court acknowledged the risk-transferring effect

of the "'classic social trade-off'" of workers' compensation: the employee gives up the "'right to recover full tort damages, including damages for pain and suffering, in cases in which there is fault on the employer's part'" in exchange for "'the right to receive certain limited benefits regardless of fault'." *Id.* at 662–63 (quoting P. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 9 (1998)).

This understanding that workers' compensation has the effect of transferring or spreading an employee's risk is not a new development in this Court's jurisprudence. In 1917, just a few years after workers' compensation laws began to proliferate, this Court recognized that the essence of workers' compensation is that it transfers risk from the individual employee to the employer: "[I]nstead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his dependents"—the employer must "bear the charge." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 203–04 (1917). Just as under an insurance policy with a policy limit, "[i]nstead of [the employee] assuming the entire consequences of all ordinary risks of the occupation," the employee assumes only "the consequences[] in excess of the scheduled compensation," and the employer assumes a "fixed responsibility." *Id.* at 201–02.

In cases involving other mechanisms for spreading risk, this Court has also focused on the substance of the relationship that transfers the risk, not on the existence of a formal insurance contract with an insurance company. In *Kentucky Association of Health Plans v. Miller*, 538 U.S. 329 (2003), this Court rejected the contention that a self-insured health plan was not insurance, because "self-insured plans engage in the same sort of risk pooling ar-

rangements as separate entities that provide insurance to an employee benefit plan." *Id.* at 336 n.1. While *Kentucky Association* focused on the savings clause of ERISA—which applies to "law[s] . . . which regulate insurance," 29 U.S.C. § 1144(b)(2)(A)—rather than on the McCarran-Ferguson Act, it interpreted the same word, "insurance," found in both statutes and expressly concluded that self-insurance is functionally the same as insurance. 538 U.S. at 336 n.1. Similarly, in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), this Court concluded that there was "no serious question" that an HMO is an insurer. *Id.* at 367. An HMO both "provides health care" and acts as an insurer, and to ignore the "insurance element" "would ignore the whole purpose of the HMO-style of organization." *Id.*

Despite all this, the Sixth Circuit stated that the "insurance-like impression" of workers' compensation "is solely a matter of appearance." Pet. App. 19a. But the only reason the court of appeals offered to support this conclusion was the fact that Petitioner does not have a formal contract of insurance with its employees. The court of appeal's analysis of the first two "business of insurance" factors—whether a practice (1) has the effect of transferring or spreading a policyholder's risk and (2) is an integral part of the policy relationship—boils down to the sole fact that "there is no contractual insurance relationship and thus no policyholder." *Id.* at 20a. It is clear, though, under *American Manufacturers*, *Howard Delivery*, *White*, and *Rush Prudential*, that workers' compensation is a form of insurance, even without a formal contract of insurance. To conclude otherwise would "ignore the whole purpose" of workers' compensation. *See Rush Prudential*, 536 U.S. at 367. Under a workers' compensation regime, the employer—like

the HMO in *Rush Prudential*—plays two roles, and one of those roles is that of insurer. And it is equally clear under *American Manufacturers* and *Kentucky Association* that self-insurance is a form of insurance. *See also* 1A COUCH ON INSURANCE § 10:1–10 (addressing self-insurance).

Attempting to bolster its conclusion, the Sixth Circuit also argued that "the employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and worker[s'] compensation merely creates a legislative remedy regarding the tort-liability relationship between employees and employers, not an insurance contract." Pet. App. 20a. The court of appeals' analysis is wrong. In the absence of the statutory workers' compensation insurance scheme, employers owe no duty to compensate employees for workplace injuries unless the injured worker can prove that the employer was at fault for the worker's injury. At the time the statute was enacted, employees were able to prove fault in less than 15% of all cases. COMPENDIUM at 11. Thus, even under the Sixth Circuit's reasoning, in the vast majority of cases an employer *is* akin to an insurer because the employer owed no preexisting duty under the common law to compensate injured workers.

### B. The Sixth Circuit's Approach To Analyzing Whether RICO Remedies "Impair" State Law Cannot Be Reconciled With *Humana*

Although the Sixth Circuit specifically noted that Michigan had made "worker[s'] compensation the exclusive remedy except in cases of intentional torts," Pet. App. 22a, it nonetheless concluded that RICO's treble damages and attorney fees would not impair

Michigan's workers' compensation act. In other words, the court reached the incredible conclusion that transforming a state insurance regime from one based on limited, exclusive administrative remedies to one under which treble damages may be sought, in court, did not "interfere with" that insurance regime.

Under the McCarran-Ferguson Act, a federal law is reverse-preempted if it would "invalidate, impair, or supersede" a state law enacted for the purpose of regulating the business of insurance. 15 U.S.C. § 1012(b). In *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), this Court interpreted the word "impair" to include instances when application of the federal law would "frustrate any declared state policy or interfere with a State's administrative regime." *Id.* at 310. In *Humana*, this Court concluded that RICO would complement, not impair, Nevada law governing insurance, because Nevada law already provided a number of other remedies, including "both statutory and common-law remedies to check insurance fraud," private rights of action, and punitive damages capable of "exceeding the treble damages available under RICO." *Id.* at 311–13. This Court specifically noted that the Nevada statute was "not hermetically sealed" and did not "exclude application of other state laws, statutory or decisional." *Id.* at 312.

But workers' compensation laws are markedly different. Most important, workers' compensation laws are specifically designed to be the *exclusive* remedy for workplace injuries. In the words of this Court, "the right of recovery granted groups of workers covered by such compensation laws is exclusive" and the "rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws." *United States v. Demko*, 385

U.S. 149, 151 (1966) (holding that remedies under a federal workmen's compensation statute were the exclusive remedy). *Accord, e.g.*, *Howard Delivery*, 547 U.S. at 663 ("[Workers' compensation] relieves the employer not only of common-law tort liability, but also of statutory liability under virtually all state statutes, as well as liability in contract and in admiralty, for an injury covered by the compensation act." (quoting 6 LARSON & LARSON, § 100.03[1], at 100-11)); *American Manufacturers*, 526 U.S. at 44 ("Following [the] model [adopted by States in the early 20th century], Pennsylvania's Worker's Compensation Act . . . makes employers' liability under this system 'exclusive . . . of any and all other liability.'" (quoting 77 PA. STAT. ANN. § 481(a)); *White*, 243 U.S. at 248 (stating, while describing New York's workers' compensation regime, that "the prescribed liability is made exclusive"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 641 (1990) ("Florida law provides that its workers' compensation remedy 'shall be exclusive and in place of all other liability of such employer to . . . the employee'"). Indeed, exclusivity is the defining feature of workers' compensation regimes. *See* CHAMBER OF COMMERCE ANALYSIS at 6 (a "basic objective[]" underlying workers' compensation laws is to provide "a single remedy"); COMPENDIUM at 23 ("[W]orkmen's compensation became the exclusive remedy of employees against employers, with the effect that injured employees ordinarily lost the right to seek a higher tort liability award than their compensation benefits. This compromise is commonly termed 'the *quid pro quo*' of workmen's compensation."). And, as the Sixth Circuit acknowledged, Pet. App. 22a, Michigan's WDCA specifically states that it is the exclusive remedy: "The right to the recovery of benefits as provided in this act shall be the em-

ployee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort." MICH. COMP. LAWS § 418.131.[2] In contrast to RICO's provision for treble damages, Michigan's WDCA specifically limits penalties for benefits not paid to $50 per day with a cap of $1,500. *See* Pet. App. 25a–26a (quoting MICH. COMP. LAWS § 418.801(2)). Thus, unlike the Nevada laws addressed in *Humana*, Michigan's workers' compensation regime *is* "hermetically sealed" and *does* "exclude application of other state laws." *Humana*, 525 U.S. at 312.

Proper application of the factors relied on in *Humana* should have compelled the Sixth Circuit to recognize that permitting RICO claims for treble damages arising from workers' compensation cases would, to put it mildly, "interfere with a State's administrative regime." *Humana*, 525 U.S. at 310.[3] As the district court noted, allowing RICO claims "would turn on its head the policy balance that the Michigan legislature struck in the WDCA" by

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[2] The intentional tort exception is limited, by statute, to situations where an "employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MICH. COMP. LAWS § 418.131(1). That exception is not applicable here.

[3] This Court also noted in *Humana* that the State of Nevada had not filed a brief urging that applying RICO would frustrate any state policy or impair the administrative regime. 525 U.S. at 313. Here, Michigan has enacted a statute to make workers' compensation an exclusive remedy, MICH. COMP. LAWS § 418.131. There can be little doubt that Michigan's policy is to preclude other remedies.

"rob[bing] . . . employers of the benefits that they were supposed to receive from the WDCA's policy balance." Pet. App. 63a–64a. The Sixth Circuit's ruling directly "interfere[s] with [Michigan's] administrative regime." *Humana*, 525 U.S. at 310.

## II. THE SIXTH CIRCUIT'S DECISION WILL IMPOSE SEVERE COSTS ON EMPLOYERS AND WILL UNDERMINE WORKERS' COMPENSATION SYSTEMS

The decision of the Sixth Circuit, if left undisturbed, will inflict economic hardship on Sixth Circuit employers, and by extension, on Sixth Circuit employees. Increasing the potential liability to employers and insurance providers for denying workers' compensation benefits by 300% will impose significant additional costs on employers (and employees), will undermine the "*quid pro quo*" of workers' compensation, *Howard Delivery*, 547 U.S. at 662–63, will greatly increase the litigation costs associated with workers' compensation, and will remove the incentives for employers to self-insure.

### A. Trebling Workers' Compensation Claims Increases Employers' Exposure By Billions Of Dollars And Undermines The Foundation Of Workers' Compensation

Nearly all employers and employees in Michigan, Ohio, Tennessee, and Kentucky are covered by workers' compensation regimes. *See, e.g.*, *Mich. Annual Report*, *supra* note 2, at 1 ("[I]t is easier to discuss the exceptions."). In Michigan, for example, more than 240,000 employers are subject to the WDCA, *id.* at 11, and in Kentucky, "[a]pproximately 80,000 employers . . . are covered under Kentucky's workers' compensation law," Ky. Dep't of Workers' Claims, http://www.labor.ky.gov/workersclaims/ (last visited

June 5, 2009). As for employees, in 2006 a total of roughly 13.6 million employees in the Sixth Circuit were covered by workers' compensation—4.1 million in Michigan, 5.2 million in Ohio, 2.6 million in Tennessee, and 1.7 million in Kentucky. Nat'l Acad. of Soc. Ins., *Workers' Compensation: Benefits, Coverage, and Costs, 2006* 10–11, *available at* http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf (hereinafter "*NASI Report*"). This coverage resulted, for the year of 2006 alone, in the payment of $5.35 billion in workers' compensation benefits. *Id.* at 20–21 (calculated from state totals in table). The potential additional risk to employers in the Sixth Circuit as a result of this decision—that is, the risk they must take into account when purchasing insurance or when setting aside funds for self-insurance—is significant. Not only are employers and workers' compensation insurance providers faced with possible treble damages and attorney fees under RICO for denying claims, but they can now be forced to incur the expense of litigating a RICO claim while the employee also pursues recovery of workers' compensation benefits through normal administrative channels. This is a dramatic departure from what the Sixth Circuit described as "merely" the bargain of workers' compensation that state legislatures have adopted to spread the risks associated with workplace injuries.

### B. Permitting RICO Claims Against Self-Insured Employers Will Drive Out Self-Insurance

The Sixth Circuit's decision also emphasizes that Cassens happens to self-insure, *see* Pet. App. 24a, 26a, claiming that this provides an additional basis for its decision. But even if the decision applied only to self-insurers, the effects of the court of appeals'

opinion would still be dramatic. Self-insured employers would still face the risk of RICO claims, the additional risk of treble damages and attorney fees under RICO, and the associated litigation expense, all of which will likely outweigh the savings arising from self-insurance. The natural result of these risks could well drive self-insurance out of the market. This outcome would have a substantial harmful effect on employers in Sixth Circuit states; in Michigan, for example, 42% of workers' compensation benefits in Michigan were paid by self-insured employers. *See NASI Report* at 20–21 (percentage derived from chart). In 2006 alone, self-insured employers paid out $612 million in benefits in Michigan; $435 million in Ohio; $260 million in Kentucky; and $191 million in Tennessee. *Id.* As "[s]elf-insurance works best when an employer has a spread of risk so large that the employer may benefit from the law of large numbers," CHAMBER OF COMMERCE ANALYSIS at 7, the employers who will be most affected by this decision include large companies, like the Big Three automakers, that are already experiencing financial hardship.

In addition, driving out self-insurance will "interfere with [States'] administrative regime[s]." *Humana*, 525 U.S. at 310. The workers' compensation regimes of each of the four states in the Sixth Circuit have specific rules directed at regulating self-insurance. *See, e.g.*, MICH. COMP. LAWS § 418.611; OHIO REV. CODE ANN. § 4123.35(B); TENN. CODE ANN. § 50-6-405; KY. REV. STAT. ANN. § 342.340; *see also NASI Report* at 10–13 (chart showing that 48 states allow self-insurance for workers' compensation). These statutes exist because these states have recognized that self-insurance is a cost-effective way for large companies (and groups of companies under

group self-insurance programs) to provide workers' compensation benefits, and the state legislatures have made the policy decision to authorize self-insurance. These portions of the states' regimes will, however, become largely irrelevant in light of the new incentives against self-insuring the Sixth Circuit has imposed.

## CONCLUSION

Further percolation in the courts of appeals is unnecessary—the issue raised by this petition is already crystallized. Allowing employees to assert RICO claims against employers for denying workers' compensation insurance benefits will have the very deleterious effect on States' insurance regimes that the McCarran-Ferguson Act is intended to prevent. Moreover, additional decisions by other courts of appeals are unlikely to lead the Sixth Circuit to change its view, given that it has already denied rehearing en banc. In light of the exceptional importance of this case and for all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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